

# The People v Their Representatives

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On July 7, 2021, the Slovak Constitutional Court [found](#) a referendum initiative on a snap election unconstitutional. In only the second case of an *ex ante* review of a referendum, the majority of judges made an effort to consolidate but also bolster the Court's jurisprudence on the subject in three steps: by identifying referenda as a source of higher law; applying the doctrine of the material core to holding a referendum; and extending the *ratio decidendi* to functionally alternative uses of the constitutional amendment power by the Parliament.

The *Early Election Referendum Case* [PL. ÚS 7/2021](#), presented the Court with an unresolved question, whether the people can remove their elected representatives from office ahead of time. The Court's answer was a qualified no. When people resort to direct democracy tools, the Court found, they are not only bound by explicit subject-matter restrictions on the use of referenda but also implicit norms under the doctrine of the material core. The people have a great power to make or unmake constitutional law but cannot breach it in an irregular use of a referendum.

## Origin of the Case

The referendum initiative at the heart of the case sought to end the term of Parliament (and thereby the government) on [account of its failures in tackling the pandemic](#). Although the initiative purported to be [nonpartisan](#), it was, in fact, a political ploy by the two largest opposition parties, which does not mean that it was not popular. More than 585,000 people signed the petition to hold the referendum – almost double the required threshold. This strong showing indicates a broader appeal of the initiative. The opposition parties successfully tapped into a general feeling of [discontent with the government's pandemic response and the current state of politics](#). Yet, similar to past referenda that sought to trigger an early election, the initiative was effectively “just another means for opposition groups to try to attack the governing parties.” Referenda remain a popular, if unsuccessful, tool in the repertoire of opposition party politics.

Earlier referenda on snap elections took place in [2000](#) and [2004](#), but neither had been litigated or, indeed, successful. The academic doctrine if an early election can be triggered by a referendum was, however, unclear, and the sole precedent (PL. ÚS 24/2014) also left formal questions about the legal force, bindingness, and direct application of a referendum result unresolved. Which is why the head of state decided to litigate. President Zuzana [#aputová](#) [initiated](#) the case on May 13, and the Court had 60 days to review the referendum question “Do you agree with the proposal to shorten the VIII term of the Parliament so that the elections are held within 180 days of the result of this referendum?” for conformity with the Constitution.

## Subject-Matter Restrictions on Referendum

There are two types of referenda in Slovakia, *compulsory* and *optional*. The people *must* approve or reject the accession or secession from a union with other states in a compulsory referendum, but *can* also decide “other important issues of public interest” in an optional popular vote. The explicit limitation on holding a referendum is the exclusion of questions of “fundamental rights and freedoms, taxes and duties, or state budget.” The Court had previously decided that these are the sole substantive restrictions. However, in the present case of an optional referendum, the Court departed from its previous case law and extended the subject-matter restrictions by a reference to the doctrine of the material core of the Constitution. The doctrine of material core, developed in an adjacent line of cases on constitutional unamendability, identifies core principles of the Constitution that cannot be modified through an amendment procedure. In a fascinating development, the Court now used the doctrine to limit the power of the people.

The Court found that a referendum decision has the legal force of a constitutional act and is politically, although not legally, binding. When the people use their voice in a referendum, they exercise a power that is analogous to lawmaking, with all restrictions that apply to the legislative power. Consequently, when people use referenda, they act as a constituted and not constitutive power, which is why they cannot break the material core of the Constitution:

[T]he Constitution characterises [referendum] as an exercise of the legislative state power (one of the types of constituted powers) directly by citizens, in contrast to the exercise of the very same power by their elected representatives – members of Parliament. The essential point is that in both cases, it is the exercise of the constituted power (not the constitutive power), which is a priori limited by constitutional rules (norms). [144]

## Material Core of the Constitution

Referenda thus allow the people to engage in rule-making or embed teleological norms in the Constitution. What they cannot do is break a general rule of the Constitution in a single instance. Applying the doctrine of the material core of the Constitution, the Court found that the challenged referendum contradicts the core principle of the generality of lawmaking, which is a constitutive principle of the rule of law, and the principle of functional separation of powers.

First, referenda ought to generate generally binding norms of conduct or teleological norms. The Court found that the referendum question calling for an early election sought to impermissibly derogate, in a single instance, general constitutional rules on the duration and end of a parliamentary term. The referendum question did not seek to create a general norm of conduct and thus breached the principle of generality.

Second, the referendum initiative would, by virtue of trying to terminate the parliamentary term in a single instance, invade the territory of other branches of the

state power that decide individual cases. The referendum would, therefore, breach the core norm of the functional separation of power.

## What Next?

The decision has important implications for the political practice and, maybe more importantly, the extent of the Court's powers. While the Court found the subject of the proposed referendum unconstitutional, it did not rule out the possibility that a referendum on early elections may be made into law. The Court recognised that referenda on early elections are slowly becoming part of the Slovak body politic, albeit subsisting in the shadow of the law. The majority of judges, therefore, prompted the amending actors to [integrate](#) the referendum "trigger" for calling an early election into the master-text Constitution as a general norm rather than an *ad hoc practice*.

Some opposition MPs have already drafted a bill to implement the requisite changes. The bill would explicitly allow for the shortening of the term of office of the Parliament by a referendum and provide a timeline for holding an election after a successful referendum vote. But a defeat of an earlier legislative proposal on the same subject prevents the bill from being debated in Parliament within a six-months of the original submission, which in this case, will not be until December 2021. So it remains to be seen if the opposition parties successfully keep the issue alive in the press and the political discourse until the winter.

Second, the decision in the *Early Election Referendum* case will likely affect the resolution of two pending cases on the subject of the material core of the Constitution. Last year, the amending actors stripped the Constitutional Court of the power to review constitutional amendments in a controversial move that was instantly challenged in court. Two points in the *Early Election Referendum* case suggest that the Court might be trying to create an opening for saving the doctrine of unconstitutional constitutional amendments, or at least what is left of it.

The Court found referenda analogous, both in form and function, to constitutional amendments. Both procedures allow for changes to the Constitution by different actors who, however, cannot change the core principles underlying the founding document. Whenever the next case on referendum review comes up, the Court will effectively engage in an *ex ante* review of a constitutional change. There is no reason why the doctrine of the material core cannot bind the amending actors if it now binds the people.

Additionally, the *ratio* in the present case can be read much broader to prevent future shortening of the parliamentary term by a constitutional act, such as in the Czech [Mel#ák Case](#) (Pl. ÚS 27/09). Although the *Early Election Referendum* case did not directly concern the use of constitutional acts by the Parliament to shorten its own term of office, the Court found this practice analogous to the challenged referendum.